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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 17 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

800 Data Base Access Tariffs)
and the 800 Service Management)
System Tariff)

CC Docket No. 93-129

To: Acting Chief, Common Carrier Bureau

CONTINGENT PETITION FOR WAIVER

U S WEST Communications, Inc. ("USWC"), through counsel, hereby requests that the requirements of Footnote 24 of the Order Designating Issues for Investigation¹ be waived to permit USWC to file with the Federal Communications Commission ("Commission") its proprietary Switching Cost Model ("SCM") and associated proprietary vendor switch data on a confidential basis. This waiver petition is contingent in nature because it is not clear that the Order in fact precludes such a confidential filing. However, based on the language of the Order and the continued pendency of the USWC Petition for Clarification or, in the Alternative, Reconsideration ("Petition for Clarification"), the instant waiver petition is filed out of an abundance of caution. The SCM cannot be filed until after appropriate confidentiality protections have been established.

The factual basis for the position advanced herein is set forth in the USWC Petition for Clarification, a copy of which is

¹800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation, 8 FCC Rcd. 5132 (1993), ("Order").

attached hereto. We also attach copies of vendor letters requesting that this data be kept confidential. Our position is very simple:

- The best way to develop costs for new services is on a forward-looking basis.
- The best way to develop forward-looking costs is through use of computer models such as the USWC SCM.
- Such computer models are customarily confidential -- the SCM is a USWC trade secret.
- Even if the SCM were not confidential, the vendor inputs to the model are extremely confidential, so much so that vendors would be unlikely to support such models in the future if their data were released.

In fact, this critical issue has been litigated before, and the Commission has already protected the basic SCM and the vendor proprietary data.² We simply cannot release these materials to the Commission without a reasonable assurance that they will be retained in confidence, and that any access outside the Commission will be strictly controlled via appropriate protective devices.

²See In the Matter of Allnet Communications Services, Inc., Freedom of Information Act Request, FOIA Control No. 92-149, Memorandum Opinion and Order, FCC 93-386, rel. Aug. 17, 1993. See also In the Matter of Allnet Communication Services, Inc., Freedom of Information Act Request, 7 FCC Rcd. 6329 (1992); Allnet Communication Services, Inc. v. F.C.C., 800 F. Supp. 984 (D.D.C. 1992), appeal pending, No. 92-5351 (D.C. Cir. September 25, 1992).

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Wherefore, we respectfully request that, to the extent necessary, the Commission waive the requirement in the Order that the SCM and associated proprietary data be entered on the public record.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.

By:



Robert B. McKenna
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036
(303) 672-2861

Its Attorney

Of Counsel,
Laurie J. Bennett

September 17, 1993

Attachments

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20584

In the Matter of) DA 93-930
)
800 Data Base Access Tariffs and) CC Docket No. 93-129
the 800 Service Management System)
Tariff)

To: Acting Chief, Common Carrier Bureau

PETITION FOR CLARIFICATION OR,
IN THE ALTERNATIVE, RECONSIDERATION

U S WEST Communications, Inc. ("USWC"), through counsel, hereby requests that the Common Carrier Bureau ("Bureau") clarify that its decision in the Order Designating Issues for Investigation in the above-captioned docket,¹ to the effect that, should a carrier choose to justify its costs for 800 service via a computer model in this proceeding, it must disclose the model itself "on the record,"² does not constitute a final order or decision denying proprietary and confidential treatment to the Switching Cost Model (or "SCM Model" or "Model") utilized by USWC to develop such costs in support of its own 800 tariff. Should it be determined that the Order did make a final decision on this issue, we respectfully request that it be reconsidered.

¹See In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff, CC Docket No. 93-129, Order Designating Issues for Investigation, DA 93-930, rel. July 19, 1993 ("Order").

²Id. at ¶ 29.

The Order stated that: "[P]rice cap [local exchange carriers] LECs using computer models to develop costs in their direct cases must disclose those models on the record if their justification for their rates is based on the use of the model."³ This decision was predicated on several factual assumptions:

- 1) That some LECs developed cost information without the use of such models.⁴
- 2) That no confidential third-party information would be compromised by release of the models.⁵

Based upon ex parte filings of other parties,⁶ it now appears that the first assumption is incorrect. All affected LECs rely on computer models for their cost analysis. In the case of USWC, as is documented in the attached affidavit of Barbara H. Stock, it is not possible to calculate costs for vertical features without using the USWC SCM Model, and would be extremely difficult to calculate other costs without the Model.⁷ As Ms. Stock's affidavit also points out, release of the USWC SCM Model would also compromise proprietary information provided to USWC in confidence by switch manufacturers.⁸ More significantly

³Id.

⁴Id. at ¶ 28.

⁵Id. at ¶ 29.

⁶Ex Parte Statement of James F. Britt, Bell Communications Research, Inc., filed August 3, 1993.

⁷Affidavit of Barbara H. Stock, Attachment A, at 6.

⁸Id. at 2.

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from USWC's perspective, the SCM Model contains confidential USWC financial information and is a USWC trade secret shielded from disclosure.⁹ Release of the Model to the public would cause economic harm to USWC and would effectuate a compensable Fifth Amendment taking of USWC's property.

In fact, as is pointed out by Ms. Stock in her affidavit, the SCM program addressed in the Order raises the same factual issues as were raised in the proceeding concerning the basic SCM Model.¹⁰ In that proceeding, the Bureau ruled that the SCM Model (and the Bellcore SCIS Model) were confidential and entitled to protection against public disclosure.¹¹ The Federal Communications Commission ("FCC") itself subsequently affirmed that conclusion in denying a Freedom of Information Act request for the models,¹² a decision affirmed by a United States District Court¹³ and currently pending before the United States Court of Appeals for the D.C. Circuit.¹⁴

⁹5 U.S.C. § 552(b)(4).

¹⁰Affidavit of Barbara H. Stock, Attachment A, at 2, 5-6.

¹¹See Commission Requirements for Cost Support Material to be Filed with ONA Access Tariffs, 7 FCC Rod. 1526, 1531-38 ¶¶ 27-73 (1992) ("ONA Proceeding").

¹²Allnet Communication Services, Inc., 7 FCC Rod. 6329-31 ¶¶ 4-20 (1992).

¹³Allnet Communication Services, Inc. v. F.C.C., 800 F. Supp. 984, 987-90 (D.D.C. 1992).

¹⁴Allnet Communications Services, Inc. v. F.C.C., No. 92-5351 (D.C. Cir. Sept. 25, 1992). This case is currently scheduled for oral argument on February 5, 1994.

As was the case with the basic SCM Model in the ONA Proceeding, USWC is willing to provide the SCM Model to the FCC in confidence.¹⁵ Our concern is that the Order not be read as having determined the confidentiality issue in advance, so that USWC, by filing the SCM Model at all, might be deemed to have waived any claim of confidentiality.

As a general rule, designation orders are interlocutory in nature and not subject to petitions for reconsideration.¹⁶ However, interlocutory rulings which would demand discovery in violation of a claim of privilege are subject to administrative appeals,¹⁷ and interlocutory rulings in a judicial context which compromise privileged or confidential information are subject to reversal via extraordinary writ.¹⁸ In short, if the Order really does require that USWC publicly disclose its confidential SCM Model, then it is a final order and a petition for reconsideration would be appropriate.

We read the Order as directing that USWC justify its tariffs, and not as foreclosing the possibility that USWC can

¹⁵USWC will extend all reasonable accommodations to parties in this matter so long as the confidentiality of the SCM Model is not compromised.

¹⁶47 C.F.R. § 1.106(a); ITT World Communications, Inc., 86 F.C.C. 2d 31, 32-33 ¶¶ 3-4 (1981); International Record Carriers' Communications, 46 F.C.C. 2d 968, 969-71 ¶¶ 4-8 (1974). They are, however, subject to FCC reconsideration on its own motion. 47 C.F.R. § 1.117.

¹⁷47 C.F.R. § 1.301(a)(2).

¹⁸In Re Von Buelow, 828 F.2d 94, 98 (2d Cir. 1987); Romanian v. Gulf Oil Corp., 738 F.2d 587, 591-92 (3d Cir. 1984); United States v. RMI Co., 599 F.2d 1183, 1185-86 (3d Cir. 1979).

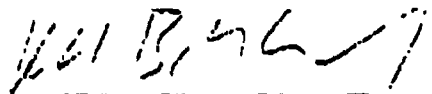
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make a proper showing sufficient to warrant issuance of a protective order or other protective device such as was utilized in the ONA Proceeding. We plan to proceed in this fashion. If, however, the Order is final in this regard, we hereby respectfully request that it be reconsidered on the basis of the attached affidavit.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.

By:



Robert B. McKenna
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036
(303) 672-2861

Its Attorney

Of Counsel,
Laurie J. Bennett

August 18, 1993

SEP 17 '93 12:57PM US WEST

P.7

Attachment A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20534

In the Matter of

800 Data Base Access Tariffs
and the 800 Service Management
System Tariff

DA 93-90

CC Docket No. 93-129

AFFIDAVIT OF BARBARA H. STOCK

STATE OF COLORADO }

County of Denver }

Barbara H. Stock, being first duly sworn, deposes and says:

I.

She is Manager - Switching Cost Modeling of U S WEST
Communications, Inc. ("USWC"), and has personal knowledge of the
facts in her affidavit.

II.

The Switching Cost Model SS7 (SCM SS7) is a computer model
that is used by USWC to estimate recurring switching costs of
services provided by USWC - specifically the 800 data base and
other Signalling System 7 based services.

III.

SCN 887 employs proprietary and original programming that is not known by persons outside the telecommunications business. Also, inputs to the model include data on switching equipment that USWC is contractually obligated to keep secret by reason of agreements with its vendors of such equipment: AT&T Technologies, Northern Telecom, Inc., Ericsson Network Systems and Digital Equipment Corporation. Some of the proprietary and original programming would, if disclosed, allow one or more of the switch vendors to learn information about their competitors' products that would not otherwise be available. Some of the outputs of the model, if disclosed, would give one or more of the switch vendors otherwise unavailable information on their competitor's pricing strategies. The supporting documentation and inputs would allow construction of a model that duplicates the functions of SCN 887. SCN 887 is another module to the SCN program which was the subject of investigation concerning USWC's pricing of Open Network Architecture Services.

IV.

SCN 887's proprietary and original programming, supporting documentation and inputs are known, within USWC, only to a select group that is responsible for the design and maintenance of that system.

V.

SCN SS7 is the model for apportioning the recurring costs of the SS7 signalling network. The basic SCN accomplishes the same task for the voice and data network. Release of the programming, supporting documentation, and inputs of the SCN SS7 would compromise the integrity of the entire SCN model, not just the module dedicated to SS7. Such release would also permit calculation of the confidential vendor switch information to the same degree as would release of the basic SCN model.

VI.

USWC diligently protects the secrecy of SCN, including SCN SS7, its inputs and documentation. Numbered copies are provided to authorized users who sign agreements restricting their use of this information. The number of authorized users is strictly controlled, and none of such users has access to the source or compiled code. All persons who have access to any information about SCN, including the system administrator and authorized programmer, are required to sign annually, as a condition of continued employment, an agreement binding them to maintain the secrecy of company information, including the information about SCN. The personal computers on which SCN operates, and the physical diskettes containing the software and

the written source code, are kept in secure, access-controlled buildings. The source code is kept in a locked cabinet.

VII.

SCN, including SCN 887, is quite valuable to USWC, and would be valuable to USWC's competitors if they obtained access to it. SCN is a valuable tool in USWC's pricing process. SCN allows USWC to calculate the recurring switching cost components of USWC's products and services. These cost components are used to determine the price floors in determining USWC's service prices. SCN, without the secret inputs consisting of pricing data from USWC's vendors, would also be a valuable property for sale to other firms that require accurate costing of switching services.

SCN, if provided to USWC's competitors, would also be valuable to such competitors. SCN would allow the competitors to predict, with far greater accuracy than they could without the model, USWC's price floors on any given competitive service that involves switching. SCN's documentation, manuals and inputs would, if disclosed to USWC's competitors, allow them to duplicate the results of the SCN model's calculation.

VIII.

It would be quite difficult for others properly to acquire this same information. Information of USWC's network requirements, initial cost of investment, investment plans, and

allocations of cost among services are not known elsewhere. The programming that integrates some widely accepted and applied principles of costing with these elements is itself not capable of being replicated without knowledge of the secret USWC information listed above.

IX.

Disclosure of SCM, its documentation, manuals and inputs would work a clearly defined and serious injury on USWC. The model is capable, after modification to substitute another user's inputs for the secret USWC input information, of providing cost calculations for others. USWC may also market this asset, minus the secret USWC inputs, to other firms in the future. Disclosure of the model would destroy the market value of this asset. Disclosure with the secret USWC inputs would also allow USWC's competitors in the telecommunications business to predict more accurately USWC's prices on any competitive services which involve switching. Disclosure of the documentation, manuals and inputs would allow USWC's competitors to duplicate the function of the model, thereby also destroying its market value and also effectively disclosing USWC's costs to USWC's competitors.

X.


I have read footnote 24 of the FCC's July 19, 1993 Order Designating Issues for Investigation, in which it is stated that

LECs can calculate 800 data base costs without use of the switching model. It is my opinion that calculation of most 800 data base costs by USWC without use of the SCN 887 model would be extremely difficult and expensive. Calculation of vertical feature costs without use of the model would, in my opinion, be impossible. In either case, even if a method of calculating 800 data base costs without use of the SCN 887 would be devised, disclosure of this data would still entail the risk of compromising the proprietary switch information currently used in the input to the model.



Barbara H. Stock

BEFORE ME came this 29th day of July, 1993, Barbara H. Stock, who being first duly sworn, stated that the facts in the foregoing Affidavit were true.



John A. Boltrame
Notary Public in and for the
State of Colorado, residing at
1881 California Street, #4700,
Denver, CO 80202.

My commission expires 12/18/93



Dennis S. Pines
Senior Attorney

Western Electric® products
2820 Warrenville Road
Lisle, IL 60532-1024
708 224-2800
FAX 708 224-4477

BY FACSIMILE

September 15, 1993

**Mr. Robert B. McKenna
Senior Counsel
U S WEST, Inc.
1801 California Street, Suite 4700
Denver Colorado, 80202**

**Re: Potential Disclosure
U S WEST's SS7SCN Model**

Dear Mr. McKenna:

This will confirm that AT&T Network Systems' data which is provided to U S WEST as input for use in US WEST's SS7SCN Model is proprietary and confidential information of AT&T. As such this data is a trade secret of AT&T and highly sensitive information.

Therefore, AT&T would object to any disclosure on the public record of such information or its disclosure to any intervenor. AT&T would also object to any similar disclosure of the U S WEST SS7SCN Model containing such input data from AT&T.

AT&T has reviewed a number of proposed mechanisms for protecting such disclosure and finds that none of the proposed mechanisms offers, in AT&T's view, sufficient protection for the type of highly sensitive, trade secret proprietary and confidential information involved in this instance.

Very truly yours,

Dennis S. Pines

**cc: Ms. Miriam Bruening
Ms. Barbara Stock**



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L. Michelle Bookman
Counsel

OPEN INFORMATION
RECEIVED-09-09-1993

September 16, 1993

Mr. Robert McKenna
U S WEST, Inc.
1801 California Street
Suite 4730
Denver, Colorado 80202

Re: Proposed Release of Ericsson Proprietary Information

Dear Mr. McKenna:

I am writing on behalf of Ericsson Network Systems Inc. ("Ericsson") to strenuously protest U S WEST, Inc.'s ("U S WEST") proposed public release in connection with the 800 data base tariffs of Ericsson's proprietary information contained within U S WEST's Switching Cost Model ("SCM").

Ericsson considers the technical and commercial information that it provides to U S WEST for incorporation into SCM to be highly proprietary and trade secret. As a result, Ericsson only provided this information to U S WEST pursuant to a signed non-disclosure agreement (Agreement Regarding Service Costing Proprietary Information, dated August 15, 1991). In addition, Ericsson has vigorously resisted past efforts to make switching cost models such as SCM part of the public record; for example, in the FCC Open Network Architecture and Oregon PUC tariff proceedings. (For a complete explanation of Ericsson's legal and business objections to the public disclosure of SCM and Bellcore's analogous costing model, please refer to Ericsson's filings in these proceedings. I would be happy to supply you with copies of these filings if U S WEST's copies are not readily available to you.)

As you are probably aware, the Ericsson information contained in SCM is provided to U S WEST as a complementary service for a valued customer. However, many in Ericsson would appreciate a reason to discontinue providing this information, which is expensive to gather and poses significant commercial risks due to potential exposure of this information to our competitors. Inclusion of Ericsson information in the public record for the 800 database tariffs would be just the competitive blow that could convince Ericsson management that Ericsson is foolish to continue providing this type of information to U S WEST and Bellcore.

Ericsson Network Systems Inc.

730 International Parkway
Richardson, TX 75081

Telephone
214-887-0748

Fax
214-844-5388

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P.25
P.03OTHER INFORMATION
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Hence, I urge U S WEST to strongly consider its contractual obligations to Eriksen under the non-disclosure agreement between our companies, and not to take a step that could dry up the flow of information that U S WEST and Eriksen need for the costing models to be useful tools.

Thank you for your consideration of Eriksen's position. We value U S WEST's business, and look forward many more years of a mutually beneficial relationship.

Sincerely,



Michelle Boeckman

cc: Luane Gross
Larry Lyles

2/10/93/pen/10/93

nt **northern**
telecom

Northern Telecom Inc.
P.O. Box 12010
Riverside Triangle Park
North Carolina 27702-2010

1219 888-5992
TWX 711-427-1871
Telex 8101 002 374

September 16, 1993

BY TELECOPY

Robert McKenna, Attorney
U S WEST Communications, Inc.
Room 4700
1801 California Street
Denver, CO 80202

RE: FCC 800 Database Designation Order
(CC Docket No. 93-129)

Dear Mr. McKenna:

I have been asked to communicate to you, the position of Northern Telecom Inc. ("NTT") regarding possible vendor response options to the above-referenced FCC Designation Order pertaining to 800 Database Access Tariffs which was adopted and released by the FCC's Common Carrier Bureau on July 19, 1993.

By letter dated August 13, 1993 to James F. Britz of Bellcore, I recently responded to a similar request by Bellcore. NTT's position has not changed and the position taken in this letter is consistent with that August 13, 1993 letter. NTT's objective is to cooperate as fully as possible with Bellcore, U S WEST and the FCC in connection with the Designation Order, consistent with the appropriate protection of NTT's confidential information including technical and other strategically sensitive data.

In my August 13, 1993 letter I noted that Mr. Britz had indicated to me that the FCC and Bellcore desired to avoid following the same expensive and time-consuming process with respect to the Designation Order that was followed in connection with the FCC's ONA proceeding in order to protect the switch vendors' confidential information. In that regard, he also indicated to me that two alternative processes for protection of the switch vendors' confidential information were under consideration in order to address the FCC's requirements as well as the concerns of the switch vendors, such as NTT, for the protection of their confidential

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information. For purposes of this letter, I assume that U S WEST shares in Bellcore's and the FCC's desires and wants to be advised of NTT's position on the above-referenced alternative processes.

As I understand these alternative processes, one process would involve some form of certification or confirmation to be provided by each switch vendor to the FCC concerning the accuracy and/or completeness of that switch vendor's switch data that has been furnished to U S WEST for use by U S WEST in the portion of U S WEST's SCM model that determines 557 Investments ("557 Portion"). The other process, as I understand it, would require the agreement of the switch vendors to allow U S WEST to disclose fully the 557 Portion of the SCM model and its contents, including the switch vendors' confidential information, to intervenors in the Designation Order proceeding, subject to a Nondisclosure Agreement.

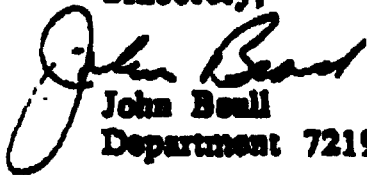
In NTT's view, the latter alternative involving full disclosure of the 557 Portion of the SCM model does not appear to be appropriate for protection of NTT's confidential information. The information provided by NTT to U S WEST in connection with the 557 Portion of the SCM model is similar to that provided by NTT to U S WEST with respect to the remainder of U S WEST's SCM model which was the subject of the FCC's ONA proceeding. In that regard, our position concerning the possible disclosure of NTT's information to intervenors in this proceeding, even under a Nondisclosure Agreement, would be similar to the position we took in the FCC's ONA proceeding. We would object to such disclosure. NTT would not object, however, to protections in this proceeding which were no less protective of NTT's confidential information than the protections which applied to NTT's information pursuant to the FCC's ONA proceeding.

On the other hand, we believe that it is possible that the other alternative process which would involve some type of certification or confirmation by NTT and the other switch vendors with respect to the accuracy and/or completeness of their switch data that was used by U S WEST in the 557 Portion of the SCM model may be appropriate. Before NTT could take a definitive position on this alternative we would need to understand better the details concerning the processes and requirements that would apply to the alternative. For example, since NTT has had limited access to the SCM model it would not appear to be appropriate for NTT to certify or confirm that NTT's information has, in fact, been appropriately inputted into the 557 Portion of the SCM model.

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In conclusion, we believe the certification/confirmation process identified above is likely to be the more appropriate of the two alternatives for the protection of NTT's and the other switch vendor's confidential information. We are willing to consider that alternative further upon receipt of a more detailed description of that alternative. We would be pleased to work with US WEST, Bellcore and/or the FCC to attempt to provide our insights with respect to the further definition of that alternative, if you believe that would be helpful.

Sincerely,



John Beall
Department 7219, RTP

nt6239a/fs

cc: Paul DeJough
Mike Bass

U S WEST (Telecopy - (303)896-3276)
Barbara Stock

Bell Communications Research, Inc.
James F. Britt

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 17th day of September, 1993, I have caused a copy of the foregoing **CONTINGENT PETITION FOR WAIVER** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

*Tariff Division
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*J. Christopher Frentrop
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Kathleen B. Levitz
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

*Colleen Boothby
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Gregory J. Vogt
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Mark Uretsky
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Judith A. Nitsche
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Peggy Reitzel
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*Steven Funkhouser
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Gary Phillips
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*Tariff Division
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*J. Christopher Frentrop
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Kathleen B. Levitz
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

*Colleen Boothby
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Gregory J. Vogt
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Mark Uretsky
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Judith A. Nitsche
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Peggy Reitzel
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*Steven Funkhouser
Federal Communications Commission
Room 518
1919 M Street, N.W.
Washington, DC 20554

*Gary Phillips
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554